(1) Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SUZANNE HANSARD,

Petitioner,

v.

REDDING RANCHERIA,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Whether an Indian tribe enjoys sovereign immunity for a tort committed by the tribe while the tribe is outside of Indian country.

PARTIES TO THE PROCEEDING

The petitioner in this case is Suzanne Hansard. The respondent is Redding Rancheria. No party is a non-governmental corporation within the purview of Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Suzanne Hansard respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California for the Third Appellate District in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California for the Third Appellate District is reported at Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384. The California Supreme Court denied review on June 13, 2001. By rule of court (California Rules of Court, Rule 24, subd. (a)), the decision in the Court of Appeal became final on that date.

JURISDICTION

The decision of the Court of Appeal of the State of California for the Third Appellate District was filed on April 6, 2001, and a timely petition for review in the California Supreme Court was denied on June 13, 2001. This court's

jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause provides that: The congress shall have power...to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. U.S. Const., Art. I, § 8.

The Ninth Amendment provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. U.S. Const., Amd. 8.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const., Amd. 10.

California Civil Code section 1714, subdivision (a), provides, in relevant part:

Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his

want of ordinary care or skill in the management of his property or person. Cal. Civ. Code § 1714, subd. (a).

STATEMENT OF THE CASE

This case arises out of a Christmas party at the Holiday Inn in Redding, California, which was given by Win River Casino, an Indian tribal entity of Redding Rancheria, for its employees. Redding Rancheria is a federally recognized Indian tribe. Suzanne Hansard, an employee of the Holiday Inn, was working as a bartender at the Christmas party on December 18, 1998. As the evening progressed and alcoholic libations flowed, the guests became increasingly raucous and rowdy. While Suzanne Hansard was working behind her bar, she was struck on the head by a gift box thrown by a casino manager passing out gifts to the casino's employees. The employees of Win River Casino are not necessarily members of the tribe.

After her injury, Suzanne Hansard brought an action against Win River Casino and other defendants for damages.

Win River Casino then filed a motion to quash service of summons and complaint asserting that it was entitled to tribal sovereign immunity, thereby depriving the Shasta County Superior Court of jurisdiction. Win River Casino's motion was opposed by Suzanne Hansard. The motion was denied by the Shasta County Superior Court on September 11, 2000.

Win River Casino, now styling itself Redding Rancheria, petitioned the Court of Appeal of the State of California for the Third Appellate District for a writ of mandate seeking to overturn the Superior Court's order denying the motion to quash service of summons and complaint. That petition was denied, whereupon Redding Rancheria sought review in the California Supreme Court. The California Supreme Court granted review and remanded the case to the Court of Appeal for the Third Appellate District with instructions to issue an alternative writ and hold a hearing.

The alternative writ was issued and the cause was argued and submitted on March 20, 2001. On April 6, 2001, the decision of the Court of Appeal for the Third Appellate

District was filed, commanding issuance of a writ of mandate requiring the trial court to vacate the order denying Redding Rancheria's motion to quash service of summons and complaint and ordering the trial court to enter a new order granting the motion.

Suzanne Hansard timely filed a petition for review in the California Supreme Court. That petition was denied on June 13, 2001.

The result is that petitioner, Suzanne Hansard, is denied recovery for her injuries under California's basic tort law from Redding Rancheria, the entity that set in motion the events which ultimately resulted in her injury. The consequence is that Suzanne Hansard may never be fully compensated for her injuries, while the wealthiest tortfeasor escapes all liability, unless this court intervenes.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW GOES BEYOND THIS COURT'S HOLDING IN KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

Relying largely on Kiowa Tribe of Oklahom., v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (hereinafter, Kiowa Tribe), the Court of Appeal for the Third District held, "[A]n Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country." Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, at 386 (hereinafter, Redding Rancheria). The Court of Appeal found the tribal activity to be immunized whether or not tribal goals or tribal self-government was implicated. Redding Rancheria, at p. 388. But, the Kiowa Tribe court's holding was more restrictive in defining the scope of a tribe's immunity. The Kiowa Tribe court held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."

Kiowa Tribe, at 523 U.S. 760, 118 S.Ct. 1705. Here, the Court of Appeal decision goes well beyond the scope of the tribal immunity recognized by Kiowa Tribe and is not supported by the actual holding of Kiowa Tribe. On the other hand, other decisions of this Court support a refusal to extend tribal immunity for off-reservation torts.

Prior to Kiowa Tribe, it was clearly established that, "absent express federal law to the contrary, Indians going beyond reservation boundaries have been generally held subject to non-discriminatory state law otherwise applicable to all citizens of the state." Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (hereinafter, Mescalero Apache Tribe). Unless Kiowa Tribe is expanded beyond the confines of its actual holdings, the rule of Mescalero Apache Tribe remains good law.

As the majority in Kiowa Tribe admit, the doctrine of Indian tribal immunity is judge-made law. Kiowa Tribe, at 523 U.S. 754 and 759, 118 S.Ct. 1703 and 1705. In theory, then,

there is no valid reason why this court could not place constraints on tribal immunity for torts committed by the tribe outside of Indian country. In point of fact, as Justice Stevens pointed out in his dissent in Kiowa Tribe, the two earliest Supreme Court opinions cited by the majority as the genesis of the doctrine of tribal sovereign immunity, Turner v. United States (1919) 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (Turner) and United States v. United States Fidelity & Guaranty Co. (1940) 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (USF&G), both arose out of conduct that occurred on Indian reservations. Kiowa Tribe, at pp. 761-762, dissenting opinion of Stevens.

In Supreme Court cases after USF&G, the Supreme Court made it clear that the states have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some on-reservation activities. Kiowa Tribe, at 523 U.S. 762, 118 S.Ct. 1706. In Puyallup Tribe, Inc. v. Department of Game of Wash. (1977) 433 U.S. 165, 175-176, 97 S.Ct. 2616, 2622-2623, 53 L.Ed.2d 657, the Supreme Court rejected

the Puyallup Tribe's claim that its tribal immunity precluded the state of Washington from regulating fishing activities on its reservation. As the dissent in Kiowa Tribe observed, since the Puyallup Tribe decision and up until the Kiowa Tribe decision, the Supreme Court had considered the doctrine of tribal sovereign immunity only in considering controversies arising on reservation territory. Kiowa Tribe, at 523 U.S. 763, 118 S.Ct. 1707. Prior to Kiowa Tribe, the Supreme Court had never applied the doctrine of tribal sovereign immunity to conduct which occurred entirely off-reservation. Kiowa Tribe, at 523 U.S. 764, 118 S.Ct. 1707. In making this point, Justice Stevens stated in his dissenting opinion at 523 U.S. 764, 118 S.Ct. 1707:

> "In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between

> the states' power to regulate the off-reservation conduct of Indian tribes and the states' power to adjudicate disputes arising out of such off-reservation conduct."

Unless Kiowa Tribe is expanded beyond its actual, true holding, Mescalero Apache Tribe remains good law. When a tribe or tribal entity goes beyond the reservation boundaries, the tribe or tribal entity should be held subject to non-discriminatory state law otherwise applicable to all citizens of the state. Mescalero Apache Tribe, at 411 U.S. 148-149, 93 S.Ct. 1270. Mescalero Apache Tribe provides good authority for a decision by this court refusing to extend or expand Kiowa Tribe beyond its actual holding, which is limited to tribal immunity from suits on contracts, whether made on or off the reservation.

This is the very case which the dissent in Kiowa Tribe feared: The case of a person injured by a tort committed by the tribe outside of Indian country where the tort victim had no opportunity to negotiate for a waiver of sovereign immunity. Kiowa Tribe, at 523 U.S. 766, 118 S.Ct. 1708.

Even the majority in Kiowa Tribe doubted the wisdom of continuing in effect the doctrine of tribal sovereign immunity, let alone expanding its scope. The Kiowa Tribe court observed at 523 U.S. 758, 118 S.Ct. 1704-1705:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachment by states. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); Potawatomi, supra; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. [¶] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule..."

Nevertheless, the Kiowa Tribe court deferred to Congress the issue of the continued existence of tribal immunity and/or its scope, even though the Court admitted that

the entire doctrine of tribal immunity was one created by the Court. Kiowa Tribe, at 523 U.S. 758, 759, 118 S.Ct. 1705.

The majority in Kiowa Tribe had good reason for doubting the wisdom of perpetuating the present doctrine of tribal immunity. That reason is best expressed by Justice Stevens' argument in his dissenting opinion in Kiowa Tribe. Justice Stevens observed at 523 U.S. 765, 766, 118 S.Ct. 1708:

> "Three compelling reasons favor the exercise of judicial restraint.
>
> First, the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's performance of a legislative function. The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a rule that pre-empts state power. The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, see, e.g. Chipollone v. Liggett Group, Inc. (505 U.S. 504, 516, 518, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992), apply with added force to judge-made rules.
>
> In the absence of any congressional statute or treaty defining the Indian tribe's sovereign immunity, the creation of a federal common-law 'default' rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to

Congress or exercising 'caution,' ante, at 1705 – rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity – indeed, it all but concedes that the present doctrine lacks such justification, ante, at 1704 – and completely ignores the State's interests. Its opinion is thus a far cry from the 'comprehensive pre-emption inquiry in the Indian law context' described in Three Affiliated Tribes that calls for the examination of 'not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake...' 476 U.S., at 884, 106 S.Ct., at 2310 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584-2585, 65 L.Ed.2d 665 (1980)). Stronger reasons are needed to fill the gap left by Congress.

Second, the rule is surprisingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. See, 28 U.S.C. §§ 1346(b), 2674 (Federal Tort Claims Act); §§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a direct effect in the United States. § 1605(a)(2). And a state may be sued in the courts of another state. Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). The fact that the states

> surrendered aspects of their sovereignty when they joined the union does not even arguably present a legitimate basis for concluding that the Indian tribes retained – or, indeed, ever had – any sovereign immunity for off-reservation commercial conduct.
>
> Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule for lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct."

The Kiowa Tribe majority's doubt, coupled with the dissent's argument in favor of judicial restraint, strongly counsel the court in this case to exercise that judicial restraint by refusing to extend and expand the doctrine of tribal immunity beyond that of the actual holding of Kiowa Tribe. No sound policy reason exists for absolving a tribe or tribal entity from the consequences of its tortious conduct committed outside the boundaries of Indian country, especially when that conduct occurs in the course of activity that has no impact on tribal self-governance or tribal self-sufficiency. No sound policy exists for creating a second class of citizens who may be

denied the full measure of recovery when they are injured by torts committed outside Indian country by a tribe or tribal entity, especially when the victim did not know he or she was dealing with the tribe and did not know about tribal immunity. Any expansion or extension of the doctrine of tribal immunity to immunize off-reservation torts committed by a tribe or tribal entity raises grave and fundamental constitutional equal protection and Tenth and Eleventh Amendment questions. The Court should grant certiorari to clearly limit the doctrine of tribal immunity to the actual holding of Kiowa Tribe, which applies only to actions on contracts. After all, parties to a contract can negotiate a waiver of tribal immunity; tort victims cannot.

II.

THE DECISION BELOW DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deny

to any person within its jurisdiction the equal protection of the laws." If the decision below is allowed to stand, Suzanne Hansard will have been effectively denied the equal protection of the laws of the State of California guaranteed to her by the Fourteenth Amendment.

California Civil Code section 1714 provides, in relevant part, that "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." If the decision below is allowed to stand, Civil Code section 1714 will have no application to California Indian tribes. In derogation of the Fourteenth Amendment, Suzanne Hansard will have no remedy against Redding Rancheria for her injury. This denial of equal protection of the laws would not exist if Suzanne Hansard had been injured by a non-Indian, a non-Indian corporation, a sister state present in California (Nevada v. Hall, 440 U.S. 410 (1979)), the state of California (California Government Code section 810, et seq.), the United States (28 U.S.C. §§ 1346, 1402, 2671, et seq.), or a

foreign state present in California (28 U.S.C. § 1605(a)(5)).

This denial of equal protection is exacerbated even further when it is considered that the availability of recovery from tribal officers or employees may be severely limited and may well prove completely unavailing as a practical matter because of the absence of either indemnification from a tribe or from insurance. Indeed, what motivation is there for the tribe to purchase insurance for off-reservation torts when it can simply rely on the total immunity the decision below affords to the tribe?

III.

THE DECISION BELOW VIOLATES THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The only right enumerated in the Constitution which is material and relevant to this case is the power of Congress "to regulate commerce...with the

Indian tribes," found in Article 1, section 8, clause 3, of the U.S. Constitution. If the decision below is allowed to stand, that decision will effectively deny Suzanne Hansard's right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe at the Redding Holiday Inn, a location that is outside of Indian country. As previously noted, any relief Suzanne Hansard may obtain from tribal officers or employees may be severely limited or even completely unavailable because of the absence of either indemnification from the tribe or from insurance.

IV.

THE DECISION BELOW VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As previously noted, the only power delegated to the United States by the Constitution is the power of congress to

regulate commerce with the Indian tribes. In every other situation than the one which is the subject of the decision below, it cannot be refuted that the courts of the state of California have the power to entertain a suit by one citizen of California against another for a tortious injury inflicted on that citizen by the other within the territory of the state of California. The power of California courts to entertain a suit by a California citizen against an Indian tribe for a tort committed by the tribe outside of Indian country is nowhere prohibited to the state of California by the U.S. Constitution. That power is, accordingly, reserved to the state of California by the Tenth Amendment. If the decision below is allowed to stand, the Tenth Amendment becomes a mockery whenever an Indian tribe commits an off-reservation tort.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: October 16, 2001

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Court of Appeal, Third Appellate District – No. C036723
S097502

IN THE SUPREME COURT OF CALIFORNIA

En Banc

REDDING RANCHERIA, Petitioner,

v.

SHASTA COUNTY SUPERIOR COURT, Respondent;

SUZANNE HANSARD, Real Party in Interest.

Petition for review DENIED.

Supreme Court
FILED
June 13, 2001
Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

APPENDIX A

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Daily Journal D.A.R. 3523

Court of Appeal, Third District, California.
REDDING RANCHERIA, Petitioner,
v.
THE SUPERIOR COURT OF SHASTA COUNTY,
Respondent;

SUZANNE HANSARD, Real Party in Interest.
No. C036723.
Apr. 6, 2001.

SUMMARY
An individual filed a tort action against an Indian tribal casino and several of its employees for injuries plaintiff received while she was working as a bartender at an off-reservation hotel hosting a party for the casino. The trial court denied the tribe's motion to quash service of summons, which the tribe made on the ground the casino was an economic enterprise of the federally recognized tribe and thus immune from suit. (Superior Court of Shasta County, No. 139088, George Nelson, Judge. [FN*])
FN* Retired judge of the former Justice Court of the Sanel Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

The Court of Appeal ordered issuance of a writ of mandate commanding the trial court to vacate the order denying the tribe's motion to quash and to enter a new order granting the motion. The court held that a tribal entity is treated as the tribe for immunity purposes, and tribal immunity applies to commercial as well as governmental activities. Tort suits are not excepted from the general immunity rule. However, the tribe's sovereign immunity would not prevent plaintiff from suing individual Indians. Any unfairness to plaintiff resulting from the tribe's immunity from suit was largely a product of plaintiff's litigation tactics. Although the tribe provided a mechanism to resolve civil suits by means of a hearing before the tribal council, plaintiff refused to follow that procedure. (Opinion by Morrison, J., with Blease, Acting P. J., and Hull, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Indians § 2--Tribes--Sovereign Immunity--Tort by Tribal Entity Outside Indian Country.

In an individual's tort action against an Indian tribal casino and several of its employees for injuries *385 plaintiff received while she was working as a bartender at an off-reservation hotel hosting a party for the casino, the trial court erred in denying tribe's motion to quash, which the tribe made on the ground the casino was an economic enterprise of the federally recognized tribe and thus immune from suit. A tribal entity is treated as the tribe for immunity purposes, and tribal immunity applies to commercial as well as governmental activities. Tort suits are not excepted from the general immunity rule. However, the tribe's sovereign immunity would not prevent plaintiff from suing individual Indians. Any unfairness to plaintiff resulting from the tribe's immunity from suit was largely a product of plaintiff's

litigation tactics. Although the tribe provided a mechanism to resolve civil suits by means of a hearing before the tribal council, plaintiff refused to follow that procedure.
[See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, 100.]

(2a, 2b) Indians § 2--Tribes--Sovereign Immunity.
An aboriginal American tribe is a sovereign nation and as a matter of federal law, is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. No federal law grants California jurisdiction over off-reservation Indian torts. A state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe.

(3) Indians § 2--Tribes--Sovereign Immunity--Commercial Activity.
Tribal immunity applies to commercial as well as governmental activities, and no tribal goal is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a tribe's ability to self-govern would be infringed. The infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity. Immunity for off- reservation conduct is not a matter of comity.

COUNSEL
Rapport & Marston and David J. Rapport for Petitioner.
No appearance for Respondent.
Dugan, Barr & Associates, Douglas Mudford and J. Michael Favor for Real Party in Interest.

*386 MORRISON, J.
Here we hold an Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country.

Suzanne Hansard (plaintiff) sued Win River Casino and several Does in Shasta County Superior Court. She alleged she was working as a bartender at a Redding hotel, attending to a party "for defendant Win River and its employees, who had booked one of the facility's banquet rooms[.]" "[O]ne or more" of the employees threw gifts into the crowd, and a package struck her, causing injury. She framed the complaint in terms of negligence, assault and battery.

Redding Rancheria (Tribe) moved to quash service of summons (Code Civ. Proc., 418.10, subd. (a)(1)), alleging Win River Casino is "an economic enterprise of the Redding Rancheria, a federally recognized Indian tribe," and, hence, immune from a state tort suit. The Tribe also alleged: "Plaintiff failed to exhaust her tribal administrative remedies, which, under tribal law, is a prerequisite to filing suit." The facts regarding the Tribe's status, tribal laws, and the structure of Win River Casino as a tribal enterprise were supported by a declaration of the Tribe's attorney. In part, she declared: "The Tribe owns and operates the Win River Casino which is located within the exterior boundaries of the Tribe's Reservation in Shasta County. All persons who work in the casino enterprise are tribal employees." Although plaintiff had submitted her claim to the tribal council pursuant to a tribal claims ordinance, she declined to allow the council to adjudicate her claim; according to an annexed letter by her lawyer, plaintiff believed the fact all Tribe members had an economic interest in the casino would render the proceedings unfair.

In opposition, plaintiff filed a declaration explaining she was just doing her job at the hotel, had no knowledge of any tribal immunity, and had never consented "to waive any of my rights as a citizen of [the] State of California or the United

States of America." Had she understood the immunity now claimed by the Tribe, for conduct occurring off tribal lands, "I very likely would have declined to work the party." She presented no evidence to contest the casino's status as a tribal entity, nor that she had submitted a claim to the Tribe.

At the hearing, the Tribe urged all of the legal points raised by plaintiff's opposition had been rejected by the United States Supreme Court decision, Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751 [118 S.Ct. 1700, 140 L.Ed.2d 981] (Kiowa). The trial court denied the *387 motion, stating in part: "I can see that if they were running a business off reservation, but I can't see it here where it's a tort action."

(1a) A formal order denying the motion was served on the Tribe; the Tribe responded by filing a petition for writ of mandate. We issued an alternative writ. We now grant the Tribe's prayer for relief, for the reasons that follow.

(2a) 1. An aboriginal American tribe is a sovereign nation and "As a matter of federal law, ... is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (Kiowa, supra, 523 U.S. at p. 754 [118 S.Ct. at p. 1702]; see Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1419-1420 [88 Cal.Rptr.2d 828] (Morongo Band).) Plaintiff does not point to any federal law which grants California jurisdiction over alleged off-reservation Indian torts. In some cases, the United States Supreme Court has looked to organic acts to determine whether Congress granted a state power to regulate off-reservation Indian conduct. (E.g., Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-150 [93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114, 119-120] [New Mexico may levy nondiscriminatory

taxes on off-reservation Indian ski resort, based on provision of Enabling Act for New Mexico]; Kake Village v. Egan (1962) 369 U.S. 60 [82 S.Ct. 562, 7 L.Ed.2d 573] [considering effect of Alaska Statehood Act on tribe's right to fish].) But a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe. (See Oklahoma Tax Com'n v. Potawatomi Tribe (1991) 498 U.S. 505, 511-514 [111 S.Ct. 905, 910-912, 112 L.Ed.2d 1112, 1121-1123] (Potawatomi) [state may impose tax on Indian cigarette sales to non-Indians, but may not sue tribe to collect tax; "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"].) In any event, we find nothing in California's organic act (Act for Admission of the State of California, 9 Stat. 452), nor in any other federal law, which grants California any special power over Indian tribes. (See Long v. Chemehuevi Indian Reservation (1981) 115 Cal.App.3d 853 [171 Cal.Rptr. 733] (Long) [tribe immune from tort suit, reviewing federal law and finding no Congressional waiver of immunity]; Middletown Rancheria v. Workers' Comp. Appeals Bd. (1998) 60 Cal.App.4th 1340 [71 Cal.Rptr.2d 105] [Workers' Compensation Appeals Board lacks jurisdiction over tribe].) Plaintiff attempts to analogize the tribal claim system with California's Tort Claims Act, but this mixes apples and oranges. (See Long, supra, at p. 858, fn. 6 ["Longs mistakenly rely on various California statutes. They fail to recognize that Congress, not the California Legislature, is the entity that controls the extent to which states may exercise jurisdiction over Indian tribes"].) *388

(1b),(3) 2. Tribal immunity applies to commercial as well as governmental activities: "Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority

to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." (Kiowa, supra, 523 U.S. at p. 755 [118 S.Ct. at p. 1703] [pointing to Potawatomi case].) Contrary to plaintiff's view, no "tribal goal" is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a tribe's ability to self-govern would be infringed. (See Padilla v. Pueblo of Acoma (1988) 107 N.M. 174, 178 [754 P.2d 845, 849] (Padilla) ["the infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity"].) Padilla, relied on by plaintiff, did conclude immunity for off- reservation conduct "is solely a matter of comity." (Id. at p. 179 [754 P.2d at p. 850], cert. den. sub nom. Pueblo of Acoma v. Padilla (1989) 490 U.S. 1029 [109 S.Ct. 1767, 104 L.Ed.2d 202] [White, J., dis. from denial of cert., due to conflict among state courts on this question].) Well-reasoned cases have rejected this view. (See, e.g., Sac and Fox Nation v. Hanson (10th Cir. 1995) 47 F.3d 1061, 1064-1065 [rejecting analogy of Indian tribe to foreign sovereign; "we do not believe that the location of the commercial activity is determinative"]; In re Greene (9th Cir. 1992) 980 F.2d 590, 593-597 [questioning Padilla, "sovereign immunity, as it existed at common law, had an extra-territorial component"; Padilla "should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law"]; Morgan v. Colorado River Indian Tribe (1968) 103 Ariz. 425 [443 P.2d 421] (Morgan) [tribe immune from off-reservation tort suit]. See also Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172- 173 [97 S.Ct. 2616, 2621-2622, 53 L.Ed.2d 667] [state could not sue tribe for off-reservation conduct, only tribal members].) The comity rationale has no

further viability. (See Kiowa, supra, 523 U.S. at p. 760 [118 S.Ct. at p. 1705] ["Tribes enjoy immunity from suits on contracts, ... whether they were made on or off a reservation"]; Thompson v. Crow Tribe of Indians (1998) 289 Mont. 358, 364 [962 P.2d 577, 581] [suit to cancel liens tribe filed with county recorder, "the fact that the Tribe's action in filing its tax liens occurred off-reservation is of no consequence as regards its defense of sovereign immunity," citing Kiowa].)

(1c) 3. A tribal entity is treated as the tribe for immunity purposes. (See Ninigret Development v. Narragansett Indian (1st Cir. 2000) 207 F.3d 21, 29 (Ninigret Dev. Corp.) ["The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"]; Chance v. Coquille Indian Tribe *389 (1998) 327 Or. 318, 321 [963 P.2d 638, 639].) Although plaintiff's answer argues the casino is not in legal effect an arm of the Tribe, plaintiff presented no evidence in the trial court to challenge the Tribe's evidence the casino was an arm of the Tribe. (Cf. Trudgeon v. Fantasy Springs Casino (1999) 71 Cal.App.4th 632, 637-645 [84 Cal.Rptr.2d 65] (Trudgeon) [analyzing factors to consider when to treat a tribal entity as, in legal effect, the tribe itself].) Trudgeon specifically held an Indian casino (a tribal corporation) was entitled to immunity because of the importance of gaming in promoting tribal self-determination, the close link between the tribe and the casino, and the existence of federal law promoting Indian gambling. (Id. at pp. 639-642.) Plaintiff does not analyze the facts linking the Win River Casino to the Tribe, but instead merely distinguishes the facts of her suit against the Tribe from the facts in other cases, by means of a statement of alleged facts about the party where she was injured. This statement of facts is unsupported by citation to the trial record or to any declaration under penalty of perjury. This is not the correct analysis of an immunity question: The

casino is either an arm of the Tribe for immunity purposes or it is not, regardless of the nature of the suit.

4. Cases on state sovereign immunity (Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]) or sister state immunity (Hall v. University of Nevada (1972) 8 Cal.3d 522 [105 Cal.Rptr. 355, 503 P.2d 1363, 81 A.L.R.3d 1234]; Nevada v. Hall (1979) 440 U.S. 410 [99 S.Ct. 1182, 59 L.Ed.2d 416]), cited by plaintiff, are not relevant: "In [Blatchford v. Native Village of Noatak (1991) 501 U.S. 775 [111 S.Ct. 2578, 115 L.Ed.2d 686]], we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of ... concession' that 'makes the States' surrender of immunity from suit by sister States plausible.' [Citations.] (2b) So tribal immunity is a matter of federal law and is not subject to diminution by the States." (Kiowa, supra, 523 U.S. at p. 756 [118 S.Ct. at p. 1703]; see In re Greene, supra, 980 F.2d at pp. 593-595 [distinguishing state immunity from tribal immunity]; Long, supra, 115 Cal.App.3d at p. 857, fn. 3 ["Longs confuse the distinct doctrines of state and tribal immunity in their analysis of Nevada v. Hall [(1979) 440 U.S. 410 [99 S.Ct. 1182, 59 L.Ed.2d 416]]"].)

(1d) 5. Tort suits are not excepted from the general immunity rule. "There are reasons to doubt the wisdom of perpetuating the doctrine.... Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non- Indians. [Citations.] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort *390 victims." (Kiowa, supra, 523 U.S. at p. 758 [118 S.Ct. at p. 1704], italics added; see also id. at p. 766 [118 S.Ct. at p. 1708] (dis. opn. of Stevens, J.) ["[T]he rule is

unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships"]; Trudgeon, supra, 71 Cal.App.4th at pp. 637, 644-645 [tort suit against tribal casino barred]; Morgan, supra, 103 Ariz. 425 [443 P.2d 421].) Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) must come from Congress. (See Kiowa, supra, 523 U.S. at pp. 758-760 [118 S.Ct. at pp. 1704-1706].)

6. The Tribe's sovereign immunity does not prevent plaintiff from suing individual Indians, and the writ petition reflects plaintiff has named three individuals formerly sued as Does. Unless those individuals can show they were tribal officials acting within the scope of their authority by throwing gifts into a crowd (assuming these named individuals actually did such an act), they will not be protected by tribal immunity. (Morongo Band, supra, 74 Cal.App.4th at p. 1421; Trudgeon, supra, 71 Cal.App.4th at pp. 643-644; 4 Witkin, Cal. Procedure (4th ed. 2000 supp.) Pleading, 100, p. 22.) The allegations of the complaint, liberally construed, can be taken to mean these individuals acted wantonly, in derogation of any official duties, despite boilerplate allegations and legal conclusions of joint liability and ratification. (Cf. Trudgeon, supra, 71 Cal.App.4th at p. 644.)

7. Any unfairness here is largely a product of plaintiff's litigation tactics. Although the Tribe provides a mechanism to resolve civil suits, literally by means of a hearing before the sovereign, the tribal council, plaintiff refused to follow this procedure. (See Morongo Band, supra, 74 Cal.App.4th at pp. 1420-1421 [tribe waived immunity subject to specified conditions, which plaintiff failed to satisfy].) The tribal ordinance applies "to all claims for money or damages,

whether based on contract, tort or other cause of action." Plaintiff's counsel's letter to the Tribe states in part: "When I first submitted a claim to the council, I understood that the purpose of the submission was to provide the council with information so that its members could understand the case in order to grant a waiver of immunity." Any such understanding arose apart from the ordinance, which states in part: "Nothing in this Chapter shall be deemed to waive the sovereign immunity of the Redding Rancheria Tribe or any of its enterprises, officers, agents, or employees." (Cf. Ninigret Dev. Corp., supra, 207 F.3d at pp. 29-31 ["explicit language broadly relegating dispute resolution to arbitration constitutes a waiver of tribal sovereign immunity, whereas language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, usually will not achieve that end"].) Counsel's letter also states in part: "The less money Ms. *391 Hansard gets, the better it is for the tribe. It is fundamentally unfair for her to have to submit her claim for adjudication to anyone in such a position." However, "We presume, in view of the Tribe's obvious incentive to maintain good relations with its business clientele, that the tribal court can and will fairly adjudicate the matter." (Trudgeon, supra, 71 Cal.App.4th at p. 645; accord, Ninigret Dev. Corp., supra, 207 F.3d at p. 34 ["The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine"]; Calvello v. Yankton Sioux Tribe (1998) 1998 S.D. 107 [584 N.W.2d 108, 116-117] [suit for wrongful termination of casino manager, "By our decision, Calvello might not be deprived of his day in court, but only his day in the court of his choice"].) Although plaintiff did not choose to interact with the Tribe and did not go into Indian country (as did the plaintiff in Trudgeon), we cannot assume the Tribe's claims mechanism

operates unfairly. No doubt, plaintiff's employer would not re-let the banquet hall to the Tribe if its court system proved to be a sham, nor would other local businesses be eager to do business with the Tribe. Although a tribe's legal system may differ widely from the common law system, that does not mean the Tribe's system is fundamentally unfair. For example, according to plaintiff's counsel, this Tribe's system calls for a hearing before the tribal council, which has the power to render a binding decision, presumably without the onerous and lengthy jury trial procedures and appeals available in civil court. That members of the tribal council may share in tribal profits does not mean they cannot be fair when presented with a just claim.

Disposition

Let a writ of mandate issue, commanding the trial court to vacate the order denying the Tribe's motion to quash and to enter a new order granting the motion. Plaintiff shall pay the Tribe's costs of this proceeding.

Blease, Acting P. J., and Hull, J., concurred. *392

Cal.App.3.Dist.,2001.

REDDING RANCHERIA, Petitioner, v. THE SUPERIOR COURT OF SHASTA COUNTY, Respondent; SUZANNE HANSARD, Real Party in Interest.

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Supreme Court, U.S.
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DEC 19 2001

CLERK

No. 01-707

IN THE

Supreme Court of the United States

SUZANNE HANSARD,

Petitioner,

v

REDDING RANCHERIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD DISTRICT

BRIEF IN OPPOSITION

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Redding Rancheria respectfully opposes and urges this Court to summarily deny the petition for writ of certiorari filed by petitioner Suzanne Hansard. The petition questions whether the doctrine of tribal sovereign immunity applies to an off-reservation tort by a tribal employee. This issue was recently decided by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*"). There is no uncertainty in state or federal courts concerning this question. Petitioner has attempted to raise for the first time in her petition constitutional claims which are completely without merit and unsupported by any citations.

CORRECTIONS AND ADDITIONS TO PETITIONER'S STATEMENT OF THE CASE

Contrary to petitioner's characterization, Win River Casino is not an entity of the Redding Rancheria, a federally recognized Indian tribe, and it is not "now styling itself Redding Rancheria." Petition for Writ of Certiorari ("Petition"), p. 4. Rather, as noted in the decision of the Court of Appeal in this case, the Tribe has always directly owned and operated its casino under the name Win River Casino. All persons who work at the casino are tribal employees.

Petitioner failed to note in her petition that the Tribe has adopted a tort claims ordinance. While petitioner initially filed her claim with the Tribe, as required by that ordinance, she later withdrew the claim and refused to allow the Tribal Council to consider it. She did not believe that consideration would be fair, given that all tribal members have an "economic interest" in the casino. Petition, Appendix B, p. 4. As a result, petitioner had not exhausted her tribal remedies before she filed her suit against the Tribe and tribal employees in state court.

While petitioner filed a petition for review in the California Supreme Court, she did not serve the Redding Rancheria's attorney of record with a copy of the petition.

As noted by the Court of Appeal, petitioner also has named three individual defendants and the Court of Appeal's decision expressly held that the Tribe's sovereign immunity would not bar these claims. Petition, Appendix B, p. 10. The sole issue is whether the doctrine of tribal sovereign immunity prevents the Tribe from being held vicariously liable.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES RAISED IN THE PETITION DO NOT FALL WITHIN THE COURT'S GUIDELINES FOR GRANTING A PETITION

Under Rule 10 of the United States Supreme Court's Rules of Court ("Rule 10"): "A petition for writ of certiorari will be granted only for compelling reasons." The legal issues raised by Petitioner do not qualify under any of the criteria listed in Rule 10(a)-(c).

Of the criteria identified in Rule 10, only subdivisions (b) or (c) have any possible application to this appeal from a decision by a state court of last resort. Under Subdivision (b), this Court may grant a petition if: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

Petitioner has cited to no decision of another state court of last resort or a United States Court of Appeals with which the decision of the Court of Appeal in this matter conflicts. Moreover, Petitioner's appeal does not fall within the parameters of subdivision (c): "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The issue presented in Petitioner's appeal has already been settled by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*"), and the California Court of Appeal explicitly followed the ruling in *Kiowa* in reaching its decision.

Petitioner merely seeks to reargue the *Kiowa* decision. Her petition fails to fulfill any of the criteria set forth in Rule 10 and it must be denied.

II.

PETITIONER IS REARGUING THIS COURT'S DECISION IN *KIOWA*

Petitioner bases her petition almost entirely on an analysis of this Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, supra*, 523 U.S. 751. Petitioner fundamentally mischaracterizes the Court's decision in *Kiowa* by asserting that "the Court of Appeal decision goes well beyond the scope of the tribal immunity recognized by *Kiowa Tribe* and is not supported by the actual holding of *Kiowa Tribe*." Petition, p. 7. Citing no relevant authority, Petitioner asserts: "other decisions of this Court support a refusal to extend tribal immunity for off reservation torts." Petition, p. 7.

In *Kiowa*, both the majority and the dissent specifically addressed the issue of the applicability of the doctrine of tribal sovereign immunity to off reservation torts:

> At one time, the doctrine of tribal sovereign immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by the States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nations's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. . . . [Citations omitted.] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, *or who have no choice in the matter, as in the case of tort victims*.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. *We decline to draw this distinction* in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Kiowa, 523 U.S. at 759. Emphasis added.

Justice Stevens' dissent is even more explicit:

> [T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships.

Id., 523 U.S. at 766.

Clearly, the Court of Appeal did not expand this Court's decision in *Kiowa* by ruling that *Kiowa* applied to the present case.

Petitioner argues, Petition, p. 7, 9, that since *Kiowa* does not apply to the present case, the Court should instead apply the analysis set forth in *Mescalero Apache v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114 (1973) ("*Mescalero*").[1] Petitioner asserts that further support for her position can be found in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 657 (1977) ("*Puyallup*").

Petitioner fails to comprehend the difference between a state's authority to regulate tribal off reservation activities and a tribe's right to assert sovereign immunity from suit. This distinction was made clear by the Court in *Kiowa*, which cited *Mescalero* to illustrate that distinction:

> We have recognized that a State may have authority to tax or regulate tribal activities

1. ". . . [A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have been generally held subject to non-discriminatory state law otherwise applicable to all citizens of the state." *Mescalero*, 411 U.S. at 148-49.

> occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S. Ct. 1267, 1270-1271, 36 L. Ed. 2d 114 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S. Ct. 562, 570-571, 7 L. Ed. 2d 573 (1962). *To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.* In *Potawatomi* [*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)], for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S. Ct., at 909-910. *There is a difference between the right to demand compliance with state laws and the means available to enforce them.* See *Id.*, at 514.

Kiowa, 523 U.S. at 755. Emphasis added.

The *Mescalero* decision never addressed the issue of tribal sovereign immunity from suit. The question at issue in *Mescalero* was whether a state has authority to tax or regulate tribal commercial activities occurring within the state but outside Indian County. The issue to which Petitioner refers in *Puyallup* was whether Public Law 280[2] and the Treaty of Medicine Creek permitted the State of Washington to *regulate* off-reservation fishing activities by individual tribal members. Petitioner fails to mention that the Court in

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2. 28 U.S.C. § 1360. *See also* 18 U.S.C. § 1161.

Puyallup did address the issue of tribal sovereign immunity from suit, and upheld the Tribe's claim of immunity from suit. In fact, the Court in *Kiowa* specifically cited *Puyallup* as an example of the application of tribal sovereign immunity from suit to lawsuits based on tribal off-reservation activities:

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167, 97 S. Ct. 2616, 2618, 53 L. Ed. 2d 667 (1977). We held the Tribe's claim of immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place. *Id.*, at 168.

Kiowa, 523 U.S. at 754.

Thus, the decision in *Kiowa* specifically refutes Petitioner's argument, citing as precedent the very cases cited by Petitioner in support of her argument. Petitioner has failed to offer any legal support for her argument that the decision of the Court of Appeal went beyond the scope of the *Kiowa* decision.[3]

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3. *Mescalero* and *Puyallup* are the only decisions other than the dissent in *Kiowa* cited by Petitioner in support of her argument that tribal sovereign immunity from suit does not apply to tort claims based on off reservation activities. The only other cases cited in her petition, *Turner v. United States*, 248 U.S. 354, 39 S. Ct. 109, 63 L. Ed. 291 and *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, are cited as "the

(Cont'd)

III.

PETITIONER'S CONSTITUTIONAL CLAMS ARE MERITLESS

Petitioner presents three Constitutional claims in support of her petition based on: (1) the Fourteenth Amendment to the United States Constitution; (2) the Ninth Amendment to the United States Constitution; and (3) the Tenth Amendment to the United States Constitution. Petitioner offers no legal precedent to support her claims. Petitioner appears to allege that the Court of Appeal is guilty of the Constitutional violations by implementing the doctrine of tribal sovereign immunity from suit.

As a preliminary matter, Petitioner raises these constitutional claims for the first time on appeal to this Court. Absent exceptional circumstances, appellate courts generally will not consider arguments raised for the first time on appeal, although they have discretion to do so. *In Re America West Airlines, Inc.* 217 F.3d 1161 (9th Cir. 2000). One exceptional circumstance is when the issue is one of law and either does not depend on the factual record, or the record has been fully developed. *Id.* 217 F.3d at 1165; *Demontiney v. United States*, 255 F.3d 801, 813 (2001). While it would appear that Petitioner's constitutional claims are pure issues of law, Respondent urges the Court not to exercise its discretion in

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(Cont'd)

genesis of the doctrine of tribal sovereign immunity." They have no bearing on the applicability of the *Kiowa* decision to the present case, or, more generally, the tribal sovereign immunity from suit is applicable to tort claims based on off reservation activities. Consequently, Petitioner has not cited a single case that supports her argument.

the present case for policy reasons. By failing to raise these issues in the California Supreme Court, Petitioner deprived that court of an opportunity to rule on an issue addressing the limits of a lower state court's authority. In refusing to consider issues raised for the first time in this petition, this Court will encourage petitioners to exhaust their state court judicial remedies before forcing this Court to address issues that the highest state court might resolve.

Should the Court wish to entertain Petitioner's arguments, it is, nevertheless, clear that Petitioner's claims are meritless. Petitioner appears to argue that the Court of Appeal violated her rights under the Fourteenth, Ninth, and Tenth Amendments in reaching its decision in this case. Given the fact that the Court was merely implementing this Court's ruling in *Kiowa* and related sovereign immunity cases, it is evident that there is no substance to Petitioner's constitutional claims. Respondent will, nevertheless, briefly respond to each of Petitioner's claims.

A. The Lower Court's Decision Did Not Violate the Fourteenth Amendment.

Initially, it must be recognized that no discrimination occurred in this case that would give rise to an equal protection claim. Tribal sovereign immunity from suit protects tribes from unconsented suit by everyone other than the federal government: individuals, corporations, private organizations, states and Indian tribes who file suit against a federally recognized Indian Tribe are all subject to the defense of tribal sovereign immunity. Petitioner was not treated differently than any other person in this regard. *See, for example, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Second, Respondent is aware of no case in which tribal sovereign immunity was challenged, let alone successfully challenged, on the basis of the equal protection clause of the Fourteenth Amendment. Courts have, however, addressed the issue of equal protection in the context of laws designed to benefit individual Indians.

This Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977); *United States v. Antelope*, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Fisher v. District Court*, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976); *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). In *Morton v. Mancari*, *supra*, 417 U.S. at 552, the court stated:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Upholding a law granting Indians a hiring preference at the BIA, the court further stated, "The preference, as applied

is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . ." *Id.*, 417 U.S. at 554. In that same decision, this Court articulated a test for the analysis of preferential treatment of Indians: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.*, 417 U.S. at 555. The Court upheld the Indian hiring preference law, because "the preference is reasonable and rationally designed to further Indian self government. . . ."

Applying the *Morton v. Mancari* test to the present situation, this Court in *Kiowa* provided a lengthy and detailed explanation of tribal sovereign immunity, which provides a rational basis for upholding that immunity. The rational basis expressed in *Kiowa*, together with numerous other federal court precedents, were the basis for the Court of Appeal's ruling. Under the applicable court precedents, the Court of Appeal did not violate Petitioner's Fourteenth Amendment rights.

B. The Application of the Doctrine of Tribal Sovereign Immunity Does Not Constitute a Violation of the Ninth Amendment.

Petitioner, citing the language of the Ninth Amendment to the United States Constitution, asserts that, "If the decision below is allowed to stand, that decision will effectively deny Suzanne Hansard's right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe at the Redding Holiday Inn, a location that is outside of Indian Country." Petition, p. 18. Petitioner offers no legal authority to support her suggestion that the right to file suit in state court against a quasi-sovereign government is a constitutional

right guaranteed by the Ninth Amendment. Nor does Petitioner cite any legal authority that supports the argument that the enforcement of tribal sovereign immunity by a court constitutes a violation of the Ninth Amendment.

Federal courts have consistently held that the Ninth Amendment is a rule of construction, and that constitutional claims cannot be based solely on rights claimed under the Ninth Amendment:

> [T]he Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States,* 944 F.2d 483, 490 (9th Cir. 1991) (rejecting Navy civilian engineer's Ninth Amendment claim arising out of allegedly improper investigation and discharge), *cert. denied,* 503 U.S. 951, 112 S. Ct. 1514, 117 L. Ed. 2d 650 (1992); see also *Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986) (rejecting plaintiffs' § 1983 claim based on the penumbra of the Ninth Amendment in the absence of some specific constitutional guarantee); *accord* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n. 14 (2d ed. 1988) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.") Emphasis in original.

San Diego Gun Rights Committee v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996).

Thus, Petitioner cannot claim the Ninth Amendment as an independent source of her "right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe . . ."

Not only is there no basis for claiming that the Court of Appeal's enforcement of tribal sovereign immunity is a violation of any right guaranteed under the Ninth Amendment, the Ninth Amendment also cannot be cited as a waiver of the Tribe's sovereign immunity. Respondent was unable to find any cases addressing the issue of whether the Ninth Amendment can be regarded as constituting a waiver of tribal sovereign immunity from suit. Federal courts have, however, specifically rejected the argument that the Ninth Amendment constitutes a waiver of the sovereign immunity of the federal government. *Com. of Ky. Ex rel Hancock v. Ruckelshaus*, 362 F. Supp. 360 (D.C. Ky. 1973), *aff'd*, 497 F.2d 1172, *aff'd*, 426 U.S. 167, 96 S. Ct. 2001, 48 L. Ed. 2d 555 (1976); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118, 103 S. Ct. 3086, 77 L. Ed. 2d 1347 (1983). Petitioner offers no reason why this interpretation should not apply to the immunity of Indian tribes.

Petitioner has simply not offered any legal basis for claiming that the Court of Appeal's decision violates any rights secured by the Ninth Amendment.

C. The Court of Appeal's Decision Does Not Violate Petitioner's Tenth Amendment Rights.

Petitioner's final constitutional claim is that the Court of Appeal's decision violates the Tenth Amendment to the United States Constitution. As with the other constitutional claims, Petitioner offers no legal authority to support her claim.

Respondent questions whether Petitioner has standing to assert her Tenth Amendment claim, insofar as the Tenth Amendment is designed to protect the interest of the states qua states, but, as the Ninth Circuit observed in *Nance v. Environmental Protection Agency*, 645 F.2d 702, 716 (1981), Petitioner's "claim is so patently without merit that the standing question can be left for another day."

Petitioner initially cites the language of the Tenth Amendment and then states: ". . . [T]he only power [concerning Indian tribes expressly] . . . [mentioned in] . . . the Constitution is the power [delegated to] . . . Congress to regulate commerce with the Indian tribes." While this is a proper reference to the Indian Commerce Clause, petitioner draws a false conclusion when she states: "The power of California courts to entertain a suit by a California citizen against an Indian tribe of a tort committed by the tribe outside of Indian Country is nowhere prohibited to the State of California by the United States Constitution. That power is, accordingly, reserved to the State of California by the Tenth Amendment." Petition, p. 19. In addition to citing no supporting authority, this statement ignores 200 years of judicial precedent, treating tribal sovereign immunity exclusively as a matter of federal law. As this Court stated in *Kiowa*, 523 U.S. at 755-6:

> We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not

> parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." *Id.*, at 782, 111 S. Ct., at 2582; accord *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, ___, 117 S. Ct. 2028, 2033-2034, 138 L. Ed. 2d 438 (1997). *So tribal immunity is a matter of federal law and is not subject to diminution by the States. Three Affiliated Tribes, supra*, at 891, 106 S. Ct., at 2313; *Washington v. Confederated Tribes of Colville Reservation*, 447 S. 134, 154, 100 S. Ct. 2069, 2081-2082, 65 L. Ed. 2d 10 (1980). Emphasis added.

For this reason, *Kiowa* properly concluded that a decision to limit tribal sovereign immunity should be made by Congress rather than a decision of this Court.

CONCLUSION

Petitioner has not raised any issue that meets the criteria for Supreme Court review under Rule 10. She is merely attempting to re-argue the recent, comprehensive decision of this Court in *Kiowa*. Her constitutional claims, which were not raised before any state court, including the Supreme Court of California, should not be considered by this Court. Even if this Court were to address Petitioner's constitutional claims, they can be summarily disposed of, as they are clearly meritless. Petitioner did not offer any legal support for those claims.

For all of the foregoing reasons, the Respondent Redding Rancheria respectfully requests that Petitioner Susan Hansard's Petition for Writ of Mandate be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 14 2002
CLERK

(3)

No. 01-707

IN THE

SUPREME COURT OF THE UNITED STATES

SUZANNE HANSARD,

Petitioner,

v.

REDDING RANCHERIA,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

---

REPLY BRIEF

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Counsel of Record

31 pp

Petitioner Suzanne Hansard respectfully submits this reply brief in order to challenge certain representations made in respondent's brief in opposition and to question the standing of Rapport & Marston to represent respondent before this court.

On page 2 of respondent's brief, respondent asserts, "While petitioner filed a petition for review in the California Supreme Court, she did not serve Redding Rancheria's attorney of record with a copy of the petition." This misleads the court. The true fact is that on December 8, 2000, Rapport & Marston withdrew as attorney of record for Redding Rancheria (Win River Casino) and the firm of Hollingshead, Nardine, Bennett & Jackson and Stephen J. Nardine were substituted in the place and stead of Rapport & Marston as attorneys for respondent Redding Rancheria. See Exhibit A hereto. Petitioner Suzanne Hansard filed her petition for review in the California Supreme Court on May 10, 2001. See Exhibit B hereto. At the same time, petitioner served respondent's attorneys of record, Hollingshead, Nardine,

Bennett & Jackson with a copy of the petition for review. See Exhibit B. Moreover, in a Further Case Management Conference Statement which was served and filed on June 1, 2001, Hollingshead, Nardine, Bennett & Jackson continued to represent itself as attorneys of record for Win River Casino, an entity it considers indistinguishable from Redding Rancheria. See Exhibit C hereto. See, also, page 1 of respondent's brief in opposition.

Petitioner Suzanne Hansard has never been served with any substitution of counsel or association of counsel since that served on petitioner on December 8, 2000, in which Hollingshead, Nardine, Bennett & Jackson were substituted as counsel of record for respondent. In view of these facts, petitioner questions the standing of Rapport & Marston to appear on behalf of respondent in this matter.

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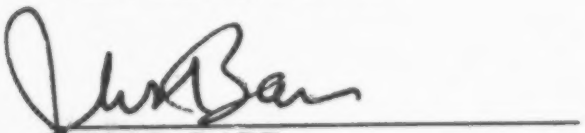
Based on the above and on petitioner's opening brief, petitioner Suzanne Hansard respectfully requests that her petition be granted.

Respectfully submitted,

Dated: January 11, 2002



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

SUZANNE HANSARD	) Unlimited
	) Case No. 139088
Plaintiff,	)
vs.	) SUBSTITUTION
	) OF COUNSEL
WIN RIVER CASINO; and DOES 1 thrugh [sic] 20, Inclusive	)
	)
Defendant.	)

Holingshead, Nardine, Bennett & Jackson and Stephen J. Nardine are hereby substituted as counsel of record for defendant Win River Casino, and David J. Rapport and Rapport & Marston hereby withdraw as attorney of record in this Court for said defendant.

Please address all further pleadings and communications as follows:

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DATD [sic]: December 8, 2000

RAPPORT AND MARSTON

By: /s/_____
David J. Rapport

DATED: December __, 2000

HOLINGSHEAD, NARDINE,
BENNETT & JACKSON

By: /s/_____
Stephen J. Nardine

Supreme Court Case No.

IN THE

SUPREME COURT OF CALIFORNIA

REDDING RANCHERIA,

Petitioner,

v.

SHASTA COUNTY SUPERIOR COURT,

Respondent

SUZANNE HANSARD,

Real Party in Interest.

After a Decision of the Court of Appeal, Third Appellate District
Case No. C036723

PETITION FOR REVIEW

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IN THE

SUPREME COURT OF CALIFORNIA

REDDING RANCHERIA,

Petitioner,

v.

SHASTA COUNTY SUPERIOR COURT,

Respondent,

SUZANNE HANSARD,

Real Party in Interest.

PETITION FOR REVIEW

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INTRODUCTION

By this petition, Real Party in Interest, SUZANNE HANSARD, frankly seeks reversal of the decision of the Court of Appeal for the Third Appellate District in Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384. The court held that "an Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country," relying largely on Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (Kiowa Tribe). But, in so holding, the Court of Appeal went well beyond the actual holding of Kiowa Tribe and **created** a new immunity. This new immunity says a tribe or a tribal entity is not answerable for an ordinary tort committed by the tribe or entity off Indian land while engaged in recreational activity having

nothing whatsoever to do with, or having any impact on, tribal self-governance or tribal self-sufficiency.

The actual holding of Kiowa Tribe was that, "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." As the dissent in Kiowa Tribe pointed out, however, even this limited holding extended the doctrine of tribal immunity well beyond the contours that had until that time existed, pointing out that, "in none of our cases have we applied the doctrine to purely off-reservation conduct." Even the majority recognized that a consideration of the harm that might befall the victim of a tort committed by a tribe or tribal entity off the reservation, as well as other considerations, suggested "a need to abrogate tribal immunity, at least as an overarching rule." (Kiowa Tribe, at 118 S.Ct. 1704-1705.) No sound reason or public policy exists for extending Kiowa Tribe beyond its actual holding, that is, tribal immunity for off-reservation contracts. No sound reason or public policy exists for a California court to **create** a new tribal immunity for off-reservation torts committed in the course of conduct which does not affect either tribal self-governance or tribal self-sufficiency. On the other hand, sound public policy

favors holding a tribe and a tribal entity responsible for its torts committed off reservation during the course of recreational or other non-governmental activity.

PETITION FOR REVIEW

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Real Party in Interest, Suzanne Hansard (hereinafter, Real Party or Hansard), respectfully petitions for review of the decision by the Court of Appeal for the Third Appellate District in Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384. A copy of the decision is attached hereto as Exhibit A.

ISSUE TO BE PRESENTED

Should a California court enlarge Indian tribal sovereign immunity beyond the boundaries established by the United States Supreme Court in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751 (118 S.Ct. 1700, 140 L.Ed.2d 981) (hereinafter, Kiowa Tribe), and thereby create a new rule of tribal immunity for a tribe which tortiously injures a state citizen

while the tribe is off the reservation engaging in recreational activities?[1]

WHY REVIEW SHOULD BE GRANTED

Indian gaming casinos are ubiquitous across California. It is to be anticipated that the tribes that own and operate these casinos will, from time to time and on special occasions such as Christmas, host parties and recognition banquets for its casino's employees, as happened in this case. It is also to be anticipated that the tribe will select an establishment that is away from the employees' ordinary work place for these parties and banquets. From time to time, one may anticipate that a non-Indian will be injured by a tort committed by the tribe or tribal entity hosting these parties or banquets, as happened here. If the decision of the Court of Appeal is allowed to stand, California will have created, by judge-made law, an underclass of citizens who

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[1] The Court of Appeal also impliedly found that Win River Casino was an arm of the tribe. The only evidentiary support for this implied finding found in the record is the declaration of the tribe's attorney, which merely states, "The tribe owns and operates the Win River Casino which is located within the exterior boundaries of the Tribe's Reservation in Shasta County." That declaration is found as Exhibit E to Petitioner's Petition for Writ of Mandate, memorandum of points and authorities and exhibits in support thereof, filed in the Court of Appeal for the Third District. Real Party has elected not to raise this issue in order to focus more fully on this attempt to limit Kiowa Tribe to its actual holding.

may not recover the full measure of their damages by reason of the immunity of the tribe or tribal entity from a suit in tort, even though the tort was committed outside Indian country and even though the tort victim may not have known he or she was dealing with a tribe or knew anything about Indian immunity. The creation of such an underclass flies in the face of constitutional equal protection. (Cal. Const., Art. I, §7.) This court can avoid such an unconstitutional and unfair result by reversing the decision of the Court of Appeal and limiting the application of Kiowa Tribe to its actual holding, that is, tribal immunity for suits on contracts. Governments, like individuals, should be liable for their torts. Nowhere should this be more true than in the case of a tort committed by a tribe or tribal entity outside Indian country.

GROUNDS FOR REVIEW

This case raises an important question of law affecting the entire State of California. If the Court of Appeal decision in this case is allowed to stand, California will have created an underclass of citizens comprised of all those non-Indians who are injured by the tort of an Indian tribe or tribal entity committed off-reservation. The tort victims in this second-class group of citizens may be thwarted in recovering the full measure of their damages by

reason of Indian tribal immunity, whereas the tort victim injured in the banquet room next door by the tort of one who is not a tribe or tribal entity will not be similarly limited in recovering his or her damages.

In holding that an Indian tribe and its commercial entity are immune for off-reservation torts, the Court of Appeal went well beyond the actual holding of Kiowa Tribe. The Court of Appeal, by judge-made law, has created a new immunity for off-reservation torts committed by a tribe or tribal entity that has never been recognized before. The Court of Appeal's decision has broad and obvious implications for all members of the general public who might be injured by an off-reservation tort of an Indian tribe or tribal entity without even recognizing that he or she is dealing with an Indian tribe and does not know of tribal immunity. On the other hand, the Court of Appeal's decision does nothing to foster off-reservation responsibility by tribes and tribal entities and, in fact, has the opposite effect.

STATEMENT OF THE CASE

Suzanne Hansard, as Real Party in Interest, files this Petition for Review of the decision of the Court of Appeal for the Third District in Redding Rancheria v. Superior Court

(2001) 88 Cal.App.4th 384, on the grounds that said decision affords relief in the form of an immunity not recognized in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981, and, in excess of the court's power, creates a new tribal immunity for off-reservation torts where none previously existed.

Statement of Facts and Procedural History

On December 16, 1999, Suzanne Hansard, Real Party in Interest, filed a complaint for damages in Shasta County Superior Court against the Win River Casino, alleging causes of action based on assault and battery and negligence. (Suzanne Hansard v. Win River Casino, Shasta County Superior Court Case No. 139088, a true and correct copy of which is attached hereto and incorporated herein as Exhibit B.) In her complaint, Hansard alleged that, on December 18, 1998, while she was working at the Holiday Inn in Redding, California, as a bartender at a Christmas party organized for the employees of the Win River Casino, she was struck on the head by a gift box thrown by one of the casino's employees, resulting in injury. The Holiday Inn is not on Indian property.

Redding Rancheria is a federally-recognized Indian Tribe. Redding Rancheria owns and operates the Win River Casino, which is located within the exterior boundaries of the Tribe's Reservation in Shasta County, California.

On January 3, 2000, the Tribe was served with Hansard's summons and complaint.

On August 11, 2000, the Tribe filed a motion to quash service of summons of the complaint and supporting papers, claiming that the Tribe's sovereign immunity extended to Win River Casino and to this tortious conduct.

At a hearing held on September 11, 2000, the Shasta County Superior Court denied the Tribe's motion.

On October 11, 2000, the Tribe filed, with the Court of Appeal for the Third District, a petition for writ of mandate pursuant to Code of Civil Procedure section 418.10.

After interim proceedings in the Court of Appeal for the Third District and in the California Supreme Court, the Court of Appeal issued an alternative writ on December 22, 2000.

The court heard oral argument on March 20, 2001. On April 6, 2001, the Court of Appeal for the Third District handed down its decision in Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, holding that "an Indian

tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country."

ARGUMENT

I. THE COURT OF APPEAL'S DECISION EXCEEDS THE SCOPE OF THE INDIAN TRIBAL IMMUNITY RECOGNIZED AND APPROVED IN KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC. (1998) 523 U.S. 751, AND SHOULD BE REVERSED.

Relying largely on Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (hereinafter, Kiowa Tribe), the Court of Appeal for the Third District held, "[A]n Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country." The Court of Appeal found the tribal activity to be immunized whether or not tribal goals or tribal self-government was implicated. But, the Kiowa Tribe court's holding was more restrictive in defining the scope of a tribe's immunity. The Kiowa Tribe court held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Here, the Court of Appeal decision goes well beyond the scope of the tribal immunity recognized by

Kiowa Tribe and is not supported by the actual holding of Kiowa Tribe. On the other hand, other, good Supreme Court law supports a decision of this court not to extend tribal immunity for off-reservation conduct beyond that actually held to apply in Kiowa Tribe.

Prior to Kiowa Tribe, it was good law that, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state." (Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (hereinafter, Mescalero Apache Tribe).) Unless Kiowa Tribe is expanded beyond the confines of its actual holding, the rule of Mescalero Apache Tribe remains good law.

As the majority in Kiowa Tribe admit, the doctrine of Indian tribal immunity is judge-made law. (Kiowa Tribe, at 523 U.S. 754 and 759, 118 S.Ct. 1703 and 1705.) But, as Justice Stevens pointed out in his dissent in Kiowa Tribe, the two earliest Supreme Court opinions cited by the majority as the genesis of the doctrine of tribal sovereign immunity, Turner v. United States (1919) 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 and United States v. United States Fidelity &

Guaranty Co. (1940) 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (USF&G), both arose out of conduct that occurred on Indian reservations. (Kiowa Tribe, at pp. 761-762, dissenting opinion of Stevens.) In Supreme Court cases after USF&G, the Supreme Court made it clear that the States have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some on-reservation activities. (Kiowa Tribe, at 523 U.S. 762, 118 S.Ct. 1706.) In Puyallup Tribe, Inc. v. Department of Game of Wash. (1977) 433 U.S. 165, 175-176, 97 S.Ct. 2616, 2622-2623, 53 L.Ed.2d 667, the Supreme Court rejected the Puyallup Tribe's claim that its tribal immunity precluded the state of Washington from regulating fishing activities on its reservation. As the dissent in Kiowa Tribe observed, since the Puyallup Tribe decision and up until the Kiowa Tribe decision, the Supreme Court had considered the doctrine of tribal sovereign immunity only in considering controversies arising on reservation territory. (Kiowa Tribe, at 523 U.S. 763, 118 S.Ct. 1707.) Prior to Kiowa Tribe, the Supreme Court had never applied the doctrine of tribal sovereign immunity to conduct which occurred entirely off-reservation. (Kiowa Tribe, at 523 U.S. 764, 118 S.Ct. 1707.) In making this point, Justice Stevens

stated in his dissenting opinion at 523 U.S. 764, 118 S.Ct. 1707:

> "In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the States' power to regulate the off-reservation conduct of Indian tribes and the States' power to adjudicate disputes arising out of such off-reservation conduct."

Unless Kiowa Tribe is expanded beyond its actual, true holding, Mescalero Apache Tribe remains good law. When a tribe or tribal entity goes beyond the reservation boundaries, the tribe or tribal entity should be held subject to non-discriminatory state law otherwise applicable to all citizens of the State. (Mescalero Apache Tribe, at 411 U.S. 148-149, 93 S.Ct. 1270.) Mescalero Apache Tribe provides good authority for a decision by this court refusing to extend

or expand Kiowa Tribe beyond its actual holding which is limited to tribal immunity from suits on contracts, whether made on or off the reservation.

II. IN EXPANDING THE BOUNDARIES OF TRIBAL SOVEREIGN IMMUNITY BEYOND THE ACTUAL HOLDING OF KIOWA TRIBE, THE COURT OF APPEAL HAS ENGAGED IN CREATING LAW, A FUNCTION NOT WITHIN ITS POWERS.

In part II of his dissenting opinion in Kiowa Tribe, Justice Stevens provides all of the reasoning and legal authority that this court needs to justify a decision refusing to expand the doctrine of tribal sovereign immunity for off-reservation conduct beyond the actual holding of Kiowa Tribe, itself. The undersigned does not believe that he can improve on Justice Stevens' argument. Justice Stevens observed at 523 U.S. 764-766, 118 S.Ct. 1708:

> "Three compelling reasons favor the exercise of judicial restraint.
>
> First, the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's performance of a legislative function. The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a

rule that pre-empts state power. The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, see, e.g. Cipollone v. Liggett Group, Inc. (505 U.S. 504, 516, 518, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992), apply with added force to judge-made rules.

In the absence of any congressional statute or treaty defining the Indian tribe's sovereign immunity, the creation of a federal common-law 'default' rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising 'caution,' ante, at 1705 – rather, **it is creating law** [emphasis added]. The Court fails to identify federal interests supporting its extension of sovereign immunity – indeed, it all but concedes that the present doctrine lacks such justification, ante, at 1704 – and completely ignores the State's interests. Its opinion is thus a far cry from the 'comprehensive pre-emption inquiry in the Indian law context' described in Three Affiliated Tribes that calls for the examination of 'not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake...' 476 U.S., at 884, 106 S.Ct., at 2310 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584-2585, 65 L.Ed.2d 665 (1980).) Stronger

reasons are needed to fill the gap left by Congress.

Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. See, 28 U.S.C. §§1346(b), 2674 (Federal Tort Claims Act); §§1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a 'direct effect in the United States.' §1605(a)(2). And a State may be sued in the courts of another State. Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). The fact that the States surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained – or, indeed, ever had – any sovereign immunity for off-reservation commercial conduct.

Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of

> sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be accountable for their unlawful, injurious conduct."

Even the majority in Kiowa Tribe doubted the wisdom of continuing in effect the doctrine of tribal sovereign immunity, let alone expanding its scope. The Kiowa Tribe court observed at 523 U.S. 758, 118 S.Ct. 1704-1705:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachment by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); Potawatomi, supra; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can

> harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. [¶] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule..."

Nevertheless, the Kiowa Tribe court deferred to congress the issue of the continued existence of tribal immunity and/or its scope, even though the Court admitted that the entire doctrine of tribal immunity was one created by the Court. (Kiowa Tribe, at 523 U.S. 758, 759, 118 S.Ct. 1705.)

The present state of affairs regarding tribal immunity strongly counsels judicial restraint. This court should exercise that restraint by refusing to extend and expand the doctrine of tribal immunity beyond that of the actual holding of Kiowa Tribe. No sound policy reason exists for absolving a tribe or tribal entity from the consequences of its tortious conduct committed outside the boundaries of Indian country, especially when that conduct occurs in the course of activity that has no impact on tribal self-governance or tribal self-sufficiency. No sound policy exists for creating a second class of citizens who may be denied the full measure of recovery when they are injured by torts committed outside

Indian country by a tribe or tribal entity, especially when the victim did not know he or she was dealing with a tribe and did not know about tribal immunity. Any expansion or extension of the doctrine of tribal immunity to immunize off-reservation torts committed by a tribe or tribal entity raises grave and fundamental constitutional equal protection questions. This court should boldly refuse to expand or extend the doctrine of tribal immunity beyond the actual holding of Kiowa Tribe.

CONCLUSION

For all the reasons stated above, Real Party, Suzanne Hansard, respectfully requests that this Court reverse the decision of the Court of Appeal for the Third District in Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384.

Dated: May 10, 2001

DUGAN BARR & ASSOCIATES

By: /s/
J. MICHAEL FAVOR

Attorneys for Real Party in Interest,
SUZANNE HANSARD

(sab)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Shasta, State of California. I am over the age of 18 years and not a party to the within action; my business mailing address is Post Office Box 994390, Redding, California 96099-4390.

I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mail box after the close of the day's business.

__XX__ On the date indicated below, I served the document(s) designated below on all parties in said action by placing a true copy thereof in a sealed envelope in the designated area for out-going mail addressed as set forth below:

PETITION FOR REVIEW

_____On the date indicated below, I personally served the document(s) designated below by delivering a true copy thereof to the person(s) and at the address(es) set forth below:

_____On the date indicated below, I served the document(s) designated below by transmitting a true copy thereof via Fax to the person(s) and at the Fax number(s) set forth below:

Stephen J. Nardine
HOLLINGSHEAD, NARDINE, BENNETT & JACKSON
P.O. Box 293328
Sacramento, CA 95829
Attorneys for Petitioner

Court of Appeal
Third Appellate District
900 N. St., Rm. 400
Sacramento, CA 95814

Clerk of the Court
Shasta County Superior Court
1500 Court Street
Redding, CA 96001

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 10th day of May, 2001, at Redding, California.

/s/ STACY BELZER

Stephen J. Nardine (SBN 137658)
HOLLINGSHEAD, NARDINE, BENNETT & JACKSON
P.O. Box 293328
Sacramento, CA 95829
Telephone: (916) 630-3803
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Attorneys For WIN RIVER CASINO; GARY HAYWARD, STEVEN HAYWARD, and MICHAEL HAYWARD

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

SUZANNE HANSARD, Plaintiff, vs. WIN RIVER CASINO, and DOES 1 to 20, inclusive, Defendants.	Case No. 139088 **FURTHER CASE MANAGEMENT STATEMENT** Date: June 11, 2001 Time:1:30 p.m. Dept: 4

THE UNDERSIGNED HEREBY SUBMITS THE FOLLOWING FURTHER CASE MANAGEMENT CONFERENCE STATEMENT:

1. Representations.

a) Name and address of counsel:

Dugan Barr — For Plaintiff
J. Michael Favor
DUGAN BARR & ASSOCIATES
P.O. Box 994390
Redding, CA 96099-4390

Stephen J. Nardine (SBN 137658) — For Defendants
HOLLINGSHEAD, NARDINE, BENNETT & JACKSON
P.O. Box 293328
Sacramento, CA 95829

b) Trial attorney:

Stephen J. Nardine will try this case for Defendants. Plaintiff to advise of their trial attorney.

c) Clients:

Win River Casino	Defendant
Gary Hayward	Defendant
Steven Hayward	Defendant
Michael Hayward	Defendant

d) Not applicable to these parties.

2. Neutral Statement of the Case:

Defendant defers to the allegations contained in plaintiff's neutral statement for purposes of this conference only.

3. Issues:

All factual allegations are in dispute.

Further, a motion to quash based on sovereign immunity was filed on behalf of Win River Casino (Redding Rancheria), which was denied by the trial court. A writ of mandamus, appealing the trial court's order was filed with the Court of Appeal, which was summarily denied. This decision was appealed to the California Supreme Court, which has remanded the matter back to the Court of Appeal for briefing, a hearing and a decision. The Court of Appeal granted the writ. Plaintiff's counsel has requested a review.

4. At-Issue Statement:

This case is not at-issue. See statements in section number 3, above.

5. Case Management:

It is requested that this case be designated as a Class III class to allow the upper courts to resolve the sovereign immunity issues of this case. Alternatively, it is requested that this action be stayed pending the appeal. It is in the court's and the parties interests to have this issue resolved first, as action by the appellate court may either completely resolve this case, or instruct the court and parties concerning the issues of the case.

///

6. Pre-Trial Activities and Requirements.

a) Law and Motion Matters:

None known at this time.

b) Bifurcation:

None known at this time.

c) Discovery:

Depositions of individual defendants have been taken. Deposition of plaintiff and witnesses remain to be taken. Written discovery will be propounded in the near future. Expert discovery, if any, to be done per code.

d) Expert Witnesses:

Unknown at this time.

e) Stipulations:

None.

f) Motions in Limine:

This party will file Motions in Limine at the appropriate time per Shasta County Local Rules.

7. Mediation/Judicial Arbitration:

a) Do the parties stipulate to binding arbitration?

No.

b) Do the parties stipulate to non-binding arbitration?

No.

c) Does the plaintiff elect arbitration?

Unknown.

d) Does the plaintiff contend that the amount in controversy exceeds $50,000?

Defendant defers to the statements contained in plaintiff's Case Management Conference Statement for purposes of this conference only.

e) Do you agree that after arbitration general discovery may remain open up to 30 days before trial?

Yes.

f) Do you agree to court-annexed mediation before the Hon, [sic] Halpin, retired?

Yes.

g) Non-binding arbitration or mediation may be helpful in the resolution of this matter. However, no alternative dispute resolution method should be assigned until the upper courts have made a final determination.

8. Trial:

a) Length of Trial:

5-7 days are anticipated for this trial. These parties reserve the right to a trial by jury.

b) Available trial dates:

1)

2)

3)

4)

9. Other matters:

Plaintiff has agreed to set aside the default of the individual defendants. As soon as the stipulation is filed, and the order approved by the Court, an appearance will be made on behalf of these parties.

This case is not prepared for trial, and it is requested that trial setting take place at some time in the future after appellate issues are resolved and discovery is completed.

DATED: June 1, 2001

HOLLINGSHEAD, NARDINE, BENNETT & JACKSON

By: /s/
STEPHEN J. NARDINE
Attorneys for Defendants

RE: Hansard v. Win River Casino, et al.
Shasta County Superior Court, Case Number: 139088
PROOF OF SERVICE BY MAIL — C.C.P. § SECTIONS 1013A, 2015.5

I declare that I am employed in the County of Placer, California. I am over the age of eighteen years and not a party to the within cause. My business address is P.O. Box 293328, Sacramento, California 95829.

On the date last written below, I caused to be served the within **FURTHER CASE MANAGEMENT CONFERENCE STATEMENT** on the parties in said cause as follows:

Dugan Barr
J. Michael Favor
DUGAN BARR & ASSOCIATES
P.O. Box 994390
Redding, CA 96099-4390
530-243-8008
FAX: 530-243-1648

XXX BY MAIL: I placed each such sealed envelope, for collection and mailing at Rocklin, California, following ordinary business practices. I am readily familiar with the practices for the processing of said mail, which is deposited in the United States Postal Service the same day as it is placed for processing.

____ BY PERSONAL SERVICE: I caused each such envelope to be delivered by hand to the addressee(s) noted in this Proof of Service.

____ OVERNIGHT SERVICE: I caused each such envelope to be delivered by Overnight/Express Mail Deliver

to the addressee(s) noted in this Proof of Service.

_____ BY FACSIMILE: I caused said document to be transmitted by facsimile machine to the number indicated after the address noted or the addressee on the facsimile cover sheet.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed June 1, 2001, at Rocklin, California.

/s/_____
DEBORAH L. DONEGAN